IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 1630 of 1982

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

MALANGBHAI BANNUBHAI

Versus

MAHAMADSHA HUSEINSHA DIVAN

Appearance:

MR JITENDRA M PATEL for Petitioner

MR KC SHAH for Respondent No. 1

CORAM : MR.JUSTICE D.C.SRIVASTAVA

Date of decision: 13/07/98

ORAL JUDGEMENT

This is tenant's revision under Section 29(2) of the Bombay Rent Act.

2. Brief facts giving rise to this revision are that the revisionist was a tenant of the respondent of one room on the ground floor on monthly rent of Rs.30/- plus Rs.3/-p.m. as electric charges. He fell in arrears of rent since 20.6.1973. As such notice of demand was sent on 1.12.1975 which was refused by the tenant and further

because there was non-compliance of Section 12(2) of the Act that the Suit for eviction of the tenant was filed. In the plaint arrears of rent were not claimed.

3. The suit was resisted on the ground that the rate of rent is unreasonable and it should be fixed at Rs.10/p.m. The revisionist denied that he was in arrears of rent since 20.6.1973. He also denied service of notice on him by refusal and pleaded that notice was not refused by him. He also denied his liability to pay the electricity charges.

4. The trial Court dismissed the suit mainly on the ground that arrears of rent were not claimed in the plaint.

5. An Appeal was preferred which was allowed. The decree for eviction was passed so also decree for mesne profits at the rate of Rs.30/- plus Rs.3/- p.m. as electricity charges. It is therefore this revision.

6. The first contention of the learned Counsel for the revisionist has been that the courts below fell in error by holding that the notice of demand was duly served on the tenant. He contended that the presumption of service of notice in case where the envelop is returned with postal endorsement of refusal is a rebutable presumption and since the revisionist in the written statement as well as in his deposition on oath denied refusal of notice the presumption stands rebutted. The case of Vadhere Devabhai Govindji V/s. Rameshwarpuri Ratanpuri, reported in 1984 G.L.H. 110 was relied upon in support of this contention. By now the law on the point has been settled by the Apex Court. It is to the effect that if the notice is sent to the addressee by registered post at correct address of the addressee and is returned with postal endorsement of refusal presumption can be drawn that the registered envelop was tendered to the addressee but he refused to accept it. Of course this presumption is rebutable which can be rebutted by the addressee himself and not by the sender. It has also been laid down by the Apex Court and other High Courts in the country that mere denial of the addressee that he did not refuse the registered envelop is no rebuttal of such presumption. The addressee has to plead and establish special circumstances indicating that actually he could not have refused to accept the notice. Some of such instances may be that the addressee on the relevant day when the registered envelop was said to have been refused was out of station or was not available or was at his employment or he was hospitalised and the

like. In the absence of special circumstances pleaded and proved by the addressee the presumption can not be said to have been rebutted by his mere denial. Since it was a case of mere denial in the written statement as well as in the witness baox the landlord was not obliged to further cross examine the tenant on the point. Since the landlord was relying upon the presumption of service he was further not obliged to examine the postman as was contended by the learned Counsel for the revisionist. On the factual side the two courts below have observed that presumption of refusal and consequent service was duly proved and could be drawn in the instant case from the evidence on record. This finding therefore requires no interference in this revision. The notice was duly and sufficiently served upon the tenant. As a consequent thereof the tenant would be presumed to have notice of the contents of the envelope.

6. The next contention has been that the notice is invalid and finding to the contrary recorded by the lower Appellate Court is erroneous. The learned Counsel for the revisionist contended that since the tenant is obliged to pay education cess along with rent hence it no more remains a monthly tenancy because education cess is not payable every month but is payable annually and consequently the nature of tenancy is converted into annual tenancy which is terminable by six months notice. I do not find any merit in this contention for two reason. Firstly the trial Court has fixed the standard rent at Rs.30/- p.m. and has not stated anything about taxes or education cess and Rs.3/p.m. in addition as electricity charges. Electricity charges willbe payable monthly and consequently the nature of tenancy will not be changed to annual tenancy.

7. It may also be mentioned that in such cases no notice of six month is required for determining the lease. Further, even if there is liability of the tenant to pay education cess, for which there is no material on record in this case, it cannot be said that the nature of tenancy stands changed to annual tenancy.

8. The next contention has been that because the arrears of rent have not been claimed in the plaint it amounts to waiver of arrears of rent and consequently notice of eviction stands waived and no decree for possession can be passed. This contention also cannot be accepted. It may be for reasons yet to be explained by the landlord why the arrears of rent were not claimed in the plaint. However that ommission may stand in the way of the landlord in claiming the same in subsequent suit

in view of the bar created by Order 2, Rule : 2 C.P.C. However, so far as section 12(3)(a) is concerned the only requirement is that the tenant should be in arrears of rent for more than six months and after service of notice of demandhe failed to pay the same within a month. Further if the tenant has not raised any dispute regarding standard rent during this period of one month he has to be evicted from the suit accommodation. There is concurrent finding of the two courts below that the revisionist was in arrears of rent for more than six months. Notice was found to be duly served by registered post. It was not the case of the tenant that he paid any rent after refusing to accept any notice. It was also not his case that he tendered any rent to the landlord within a period of one month of refusal of notice. Likewise it was not his case that he ever raised any dispute regarding standard rent during this period of one month. Consequently the decree for eviction was liable to be passed and failure of the landlord to claim arrears of rent in plaint or in suit will not amount to waiver of notice to quit. Notice to quit is said to have been waived only when there is express or implied intention of the landlord to treat the lease as subsisting after serving the notice of eviction. In the instant case there is no express or implied intention of the landlord that he ever treated the lease as subsisting after serving the notice to quit on the tenant. Consequently on this ground also the notice to quit cannot be said to be invalid nor the suit for eviction could be dismissed.

9. Learned Counsel for the revisionist further contended that the view of the lower Appellate Court that without filing cross objection the tenant had no right to contest the Appeal is erroneous. This contention can be accepted. So far as eviction is concerned naturally the decree stood in tenants' favour. Hence, he had right to support the decree for dismissal of suit for eviction on ground other than those taken by the trial Court. Consequently the tenant had right to support the decree of the trial Court in the lower Appellate Court and the view to the contrary expressed by the lower Appellate Court is contrary to law.

10. No other point was pressed. In the result I do not find any merit in this revision. The revision is therefore dismissed. No order as to costs.

10. On the request of the learned Counsel for the revisionist that one year's time may be granted to the revisionist to vacate the premises in dispute which is not opposed by the learned Counsel for the respondent,

the revisionist is granted one year's time from today for vacating the premises on the condition that he shall file usual undertaking in this Court within four weeks from today.

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